

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In re Applications of) MM Docket No. 93-88
EZ COMMUNICATIONS, INC.) File No. BRH-910401C2
For Renewal of License of FM)
Radio Station WBZZ(FM) on)
Channel 229B at)
Pittsburgh, Pennsylvania)
ALLEGHENY COMMUNICATIONS GROUP,) File No. BPH-910628MC
INC.)
For a Construction Permit for a)
New FM Broadcast Station on)
Channel 229B at)
Pittsburgh, Pennsylvania)
To: Administrative Law Judge
Edward Luton

MASS MEDIA BUREAU'S REPLY
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respectfully submitted,
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February 22, 1994

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1. On January 14, 1994, Allegheny Communications Group, Inc. (Allegheny) filed Proposed Findings of Fact and Conclusions of Law (PFCs) in the above captioned proceeding. The Bureau hereby replies to Allegheny's PFCs. Our failure to reply to any particular finding or conclusion contained in Allegheny's PFCs should not be construed as a concession to its accuracy or completeness. The Bureau submits that its findings of fact are an accurate and complete presentation of the relevant record evidence and that its conclusions of law properly apply Commission precedent in light of the record.

Renewal Expectancy - Compliance with Rules or Policy

2. Allegheny's conclusions at paragraphs 13 through 20, are predicated on its exhibits 3 and 4. Exhibit 3 is the arbitrator's decision in a proceeding between EZ Communications Inc. (EZ) and AFTRA. Exhibit 4 is a federal district court opinion enforcing the arbitrator's opinion. Both exhibits deal with a claim for severance pay brought by Liz Randolph, a former employee of EZ's Pittsburgh radio station, WBZZ. Allegheny contends that the facts in its exhibits 3 and 4 are relevant to an evaluation of the renewal expectancy EZ is to receive, if any, in this proceeding.

3. At paragraph 13 of its conclusions, Allegheny argues that: "There has been an adjudication of sexual harassment and discrimination against EZ involving employees and management at WBZZ during the license period." This conclusion is not supported by the record. Neither the arbitrator, nor the court decision affirming the arbitrator's ruling, constitute an adjudication that EZ was

guilty of either harassment or discrimination with regard to Randolph. The only issue before the arbitrator was:

Whether the actions of the grievant [Randolph] in leaving the radio station premises without completing her assigned duties constitute a flagrant neglect of duty which authorized the Company to withhold payment of severance pay?

(Allegheny Exhibit 3, p. 4, quoted at para. 25 of Allegheny's PFCs). The arbitrator did find that, in light of the egregious conduct of WBZZ disc jockeys, which was degrading and humiliating to Randolph, she was justified in leaving the station's premises without completing her assigned duties. Consequently, pursuant to the Collective Bargaining Agreement in effect at the station, he required the company to grant her severance pay. His finding that Randolph's actions were justified and that the company had to pay her severance pay was upheld by the court. This does not constitute a determination that EZ was guilty of either harassing or discriminating against Randolph.¹

4. At para. 16 of its conclusions, Allegheny contends that EZ's conduct, as described by the arbitrator, falls well within the scope of conduct prohibited by the Commission's Equal Employment Opportunity (EEO) policy. That policy prohibits broadcast stations from discriminating on the basis of, inter alia, sex, and requires

¹ The arbitrator did find that there was a parallel with circumstances "now governed by the Federal Government's Sexual Harassment Laws" (Allegheny findings para. 36), but he did not specifically find that EZ had violated those laws. Indeed, that question was not before him.

stations to foster equal opportunity in all aspects of employment policy and practice. Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967, 63 RR 2d 220, 222-23 (1987). Allegheny cites Atlantic City Community Broadcasting, Inc., 6 FCC Rcd 925 (Rev. Bd. (1991), affirmed, 8 FCC Rcd 4520 (1993), for the proposition that the Commission has recognized that sexual harassment is a form of discrimination.

5. The Atlantic City case is inapposite. In that case the applicant was not disqualified, nor were any other sanctions imposed, as a result of the conduct which caused a discrimination suit to be filed against the station which employed him. The applicant was disqualified for its failure to disclose, in response to (FCC Form 301) Question 10(a), that the suit, which had been brought pursuant to the "New Jersey Law Against Discrimination" had resulted in an adverse finding. 6 FCC Rcd at 927. Question 10(a) specifically asks, in pertinent part, if any "adverse finding [had] been made, or an adverse final action taken by a court or administrative body, as to the applicant or any party" that related to employee discrimination. Thus, whether or not the Commission would consider the underlying activity to be a violation of its rules, it was clear that the applicant had a duty to report the adverse finding which was the result of a discrimination suit and clearly within the scope of Question 10(a).

6. As noted earlier, in the instant case there is no

determination by the arbitrator that EZ violated any Commission Rules or any federal law with regard to discrimination.

Consequently, there is no basis here for consideration of the arbitrator's findings in evaluating EZ's renewal expectancy.

7. At para. 19 of its conclusions, Allegheny cites Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553 (1989), for the proposition that the Commission has disqualified a renewal applicant for a single instance of having discriminated against a job applicant. Catoctin, however, is also inapposite. As the Commission noted in Catoctin, "the HDO set out for determination the question of whether Catoctin's principal ... violated 47 C.F.R. Section 73.2080 ..." 4 FCC Rcd at 2554. Thus, in Catoctin, the renewal applicant's compliance with Section 73.2080 of the Commission's Rules was in issue. By contrast, in the instant case, based on the same facts now cited by Allegheny, the HDO declined to place EZ's compliance with Section 73.2080 in issue. 8 FCC Rcd at 2449-50. Moreover, before the effect of an applicant's compliance with the Commission's EEO rules can be considered in connection with its claim to a renewal expectancy, an issue must be specified pursuant to a prima facie showing. EZ Communications, Inc., 8 FCC Rcd 8435 (1993), GAF Broadcasting Company, Inc., 8 FCC Rcd 5496, 5499 (1993). No issue was specified, or sought, here.

8. Finally, at para. 20 of its conclusions, Allegheny cites the Supreme Court's recent holding in Harris v. Forklift Systems, Inc., U.S. Sup. Ct. Case No. 92-1168, decided November 9, 1993, to

support a claim that, here, where it has been adjudicated that a WBZZ employee was subjected to an abusive work environment (apparently relying on the arbitrator's holding), there was a violation of federal law as well as Commission policy. Initially, as noted, there has been no adjudication that EZ subjected an employee to an abusive work environment. (See para. 3, supra). In any case, as noted in the HDO, Randolph filed two lawsuits against EZ relating to her employment at WBZZ. Both of these lawsuits were settled while appeals were still pending. 8 FCC Rcd at 2449. Thus, there was no final adjudication of these suits on the merits. As the Commission stated in the HDO, "where the litigation has ended in a settlement to the apparent satisfaction of the parties, further investigation of this matter is not warranted." 8 FCC Rcd 2450.

Renewal Expectancy -- WBZZ Programming

9. At paras. 21 through 24 of its conclusions, Allegheny argues that both the quantity, scheduling and extent of WBZZ's non entertainment programming is such as to warrant no, or at most the slightest, renewal expectancy weight. With regard to quantity, Allegheny contends that the 6% non-entertainment programming broadcast by WBZZ is the same amount the Commission found insubstantial and deficient in Video 44, 5 FCC Rcd 6383 (1991). In Video 44, however, it was found by the ALJ that the licensee had broadcast "no news, no regular local programs, and effectively shut down its studios, telecast 4-5% non-entertainment programming and a drastically reduced PSA schedule at undesirable time periods - none in prime time." 5 FCC Rcd at 6385. This is not the case with WBZZ.

As noted in the Bureau's findings at paras. 5-6, WBZZ regularly broadcast issue oriented programming on Sunday mornings and more than 4 hours of news and weather each week. In addition, during the license term, WBZZ broadcast over 40,000 PSAs. (Bureau findings at paras. 5-6). In any case, as the Review Board has held, the quantitative breakdown of station programming performance "is merely one, prima facie indicator of station performance; a quick starting point, but no more." Fox Television Stations, Inc., 8 FCC Rcd 2361, 2383-84 (Rev. Bd. 1993).² Moreover, in the Fox case, the Board stated that it was "involuntarily struck" by what it found to be a "galactic abyss" in the pleading of the renewal applicant's opponents who, while arguing that a renewal applicant is to be judged by its showing of responsiveness to community issues, failed to allege that any pressing service area issue was not addressed by the station's programming or that any significant population group was slighted during the license period. 8 FCC Rcd at 2384. Suffice it to say, Allegheny also fails to identify any ascertained issue not met by WBZZ's programming or any group that the station's programming ignored. Consequently, Allegheny's proposed analysis based on the quantity of programming broadcast by WBZZ should be ignored, or given little consideration in evaluating EZ's claim to a renewal expectancy.

² In Deregulation of Radio, 84 FCC 2d 968, 983 (1981), the Commission expressly rejected the use of "numbers games" in evaluating renewal expectancy. "Rather," the Commission held, "stations should be guided by the needs of their community and the utilization of their own good faith discretion in determining the reasonable amount of programming relevant to issues facing the community that should be presented." (Id.)

10. In arguing that the scheduling of WBZZ's non-entertainment programming detracts from its renewal expectancy showing, Allegheny is correct. Much of WBZZ's public interest programming was broadcast from 4:00 a.m. to 8:00 a.m. on Sundays. The Commission has held that the time of day non-entertainment programming is presented is a relevant consideration in evaluating renewal expectancy showings. Formulation of Policies and Rules Relating to Broadcast Renewal Applications, 4 FCC Rcd 6363, 6368, n. 11 (1989). Here, reviewing WBZZ's non-entertainment programming service as a whole, it is clear that EZ has demonstrated that it is entitled to a renewal expectancy in this case despite its channeling much of its non-entertainment programming into the Sunday early morning time period. This conclusion is supported by the station's broadcast of news and weather and "Pittsburgh Opinion" throughout the week and by the substantial number of statements³ WBZZ obtained from local service organizations attesting to services rendered by the station during the license term. See para. 7 of the Bureau's findings.

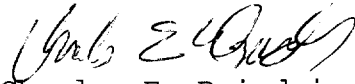
11. Finally, Allegheny contends that EZ's renewal expectancy is diminished because WBZZ broadcast only one local program, "Dialogue." This program, Allegheny contends, comprised only 0.06% of the composite week's programming. This, Allegheny claims is no different than the 0.89 percent local programming the Commission

³ In its proposed findings, at para. 7, the Bureau referred to the statements contained in WBZZ Ex. 1, as letters. In fact, the documents in Ex. 1, are sworn statements obtained by the licensee, and not letters.

found deficient and unpersuasive in Video 44. As an initial matter, Allegheny's calculation of the percent of the composite week's programming accounted for by "Dialogue" appears to be in error. "Dialogue" accounts for 0.6% of the station's 168 hours of programming per week. Moreover, Allegheny is comparing apples with oranges. The 0.89 percent figure cited by Allegheny represented the totality of the Video 44 applicant's locally produced programming. The 0.6 percent figure for WBZZ relates to locally produced non-entertainment programming. Furthermore, the 0.6 percent figure is inaccurate in that it does not include among WBZZ's locally produced non-entertainment programs, "Pittsburgh Opinion," the station's "man in the street" interview program. Sixty-eight one minute segments of this program are broadcast by WBZZ each week. (See para. 5 of the Bureau's findings). Finally, Allegheny's argument in this regard is based on a quantitative analysis of WBZZ's non-entertainment programming. As noted, supra, such analysis is of limited significance in evaluating a claim of renewal expectancy.

12. In sum, the Bureau submits that its proposed findings and conclusions concerning WBZZ's claim to a renewal expectancy better reflect the record evidence than Allegheny's and should be adopted by the Presiding Judge.

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February 22, 1994

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau certifies that she has on this 22nd day of February 1994, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Reply Findings of Fact and Conclusions of Law**" to:

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